

OLIVER REESE

IBLA 78-6

Decided February 27, 1978

Appeal from a decision of the New Mexico State Office, Bureau of Land Management dismissing a protest against the granting of a deferment of annual assessment work for mining claims. NM 31451.

Reversed and remanded.

1. Mining Claims: Assessment Work

Since a "legal impediment" which would justify the granting of a deferment to perform annual assessment work is only one which interdicts the mining claimant from access to the claim, the fact that the mining claimant is involved in a pending proceeding seeking an arrangement under Chapter XI of the Bankruptcy Act does not constitute such an impediment. While this circumstance may prevent the claimant from expending his assets to perform assessment work, it does not restrict his access to the claim.

APPEARANCES: John W. Reynolds, Esq., Silver City, New Mexico, for Appellant; Malcolm L. Shannon, Jr., Esq., Matthew, Shannon & Hooker, P.C., Albuquerque, New Mexico, for Don C. Bell II and Sidney Skarr, co-trustees.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Oliver C. Reese appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated August 25, 1977, dismissing his protest against the granting of deferments of annual assessment work to John H. Trigg (Trigg) 1/ in a decision dated

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1/ Although both Appellant and BLM refer to "John H. Trigg," the actual parties to the petition for deferment are: John H. Trigg and Pauline Van Hook Trigg d/b/a John Trigg Company, and Don C. Bell II, co-trustee in bankruptcy (with Sidney C. Skarr).

August 18, 1977. In the absence of a deferment, a mining claimant is required by 30 U.S.C. § 28 (1970) and 43 CFR 3851.1 (1976) to perform at least \$100 of assessment work annually on each unpatented mining claim. Failure to perform annual assessment work renders a claim subject to relocation or cancellation. Appellant and Trigg each hold undivided 50-percent interests in the approximately 760 unpatented mining claims described in the appendix to this opinion.

Trigg is a debtor in proceedings for an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C. § 701 et seq. (1970)) initiated in the United States District Court of New Mexico on April 21, 1977. <sup>2/</sup> The unpatented mining claims were listed as property of the debtor in these proceedings and constitute approximately 25 percent of the debtor's estate. According to the terms of a proposed arrangement, the proceeds from the sale of some of Trigg's real estate would be applied to certain debts and "the balance of the proceeds be [used] to bring current as far as possible any assessment work due on the mining properties of the debtor." Arrangement, Article I(D)(3)(e). Trigg asserts that until the Arrangement is approved by his creditors and by the court, he is not free to apply the proceeds of his estate to the performance of assessment work.

For this reason, Trigg petitioned BLM on August 12, 1977, for a deferment of assessment work on the mining claims for an initial period of 1 year pursuant to 43 CFR 3852.1 (1976) which implements 30 U.S.C. § 28b (1970). The regulation provides:

The deferment may be granted where any mining claim or group of claims in the United States is surrounded by lands over which a right-of-way for the performance of assessment work has been denied or is in litigation or is in the process of acquisition under State law or where other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof.

Trigg contends that the restrictions imposed by his bankruptcy are "legal impediments" within the meaning of the section.

On August 18, 1977, BLM granted Trigg a renewable 1 year deferment beginning on that date. The deferment was to terminate automatically as of the date conditions preventing the assessment work

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<sup>2/</sup> In re JOHN HARRY TRIGG and PAULINE VAN HOOK TRIGG, in proceedings for an Arrangement Under Chapter XI of the Bankruptcy Act, No. 77-406 and 77-407.

from being done were removed (i.e., when the Arrangement was approved). The deferment was granted only as to Trigg's 50-percent interest. In other words, Appellant, as the owner of the other 50 percent, was not relieved of his obligation to perform assessment work.

Appellant filed a protest against the issuance of the deferment on August 24, 1977. He alleges, *inter alia*:

There is no legal basis to grant the Deferment to Mr. Trigg under the circumstances since Mr. Trigg voluntarily went into Chapter XI proceedings rather than having it forced upon him, so whatever legal impediment [to performing assessment work] that exists is one of Mr. Trigg's own making; Further there are no Court decisions, to the knowledge of the Protestant, that sanction the granting of a Deferment under these circumstances.

Appellant also contended that the effect of the deferment would be to force him to do all of the assessment work himself, since he cannot file half of an assessment affidavit.

In its decision of August 25, 1977, dismissing Appellant's protest, BLM answered Appellant's implied question—does the pending approval of an arrangement under Chapter XI of the Bankruptcy Act constitute a "legal impediment" within the meaning of 43 CFR 3852.1—in the affirmative. Thus, BLM concluded, that the pending approval of the Arrangement justified granting a deferment of assessment work.

A notice of appeal was received on September 23, 1977. Appellant filed a statement of reasons on October 11, 1977, which Trigg answered on November 8.

[1] We disagree with BLM's and Trigg's position that the pending approval of an arrangement under Chapter XI of the Bankruptcy Act constitutes a legal impediment within the meaning of 43 CFR 3852.1. We therefore hold that Appellant's protest should have been sustained. An examination of the pertinent language of the regulation leads us to conclude that the "legal impediments" referred to include only those which interdict physical access of the claimant to the claim. Restrictions imposed by bankruptcy, while possibly disabling a claimant from performing assessment work, do not do so by restricting his access to the claim.

The plain meaning of the provision allows no other interpretation. 43 CFR 3852.1 refers to situations "where other legal impediments exist which affect the right of the claimant to enter upon the surface of such claim or group of claims or to gain access to the boundaries thereof." (Emphasis added.) The underlined phrase clearly delimits the scope of "legal impediments." To separate the

italicized language from the "legal impediments" would violate the syntax of the sentence.

Trigg calls our attention to the language of 43 CFR 3852.2. 3/ That section, "Filing for petition for deferment, contests" is divided into three subsections. Subsection (a) prescribes the procedure for submitting a deferment petition; subsection (b) prescribes its content where it is based on the denial of a right-of-way; and subsection (c) prescribes the content where the petition is based on "other legal impediments." Trigg argues that because the section deals separately with rights-of-way and with other legal impediments, it is intended that the definition of other legal impediments be divorced from considerations of access.

Such a construction misconceives 43 CFR 3852.2. This section is a procedural section, which merely describes how applications under the previous substantive section are to be made. Indeed, 43 CFR 3852.1 restates the parent statutory provision, 30 U.S.C. § 28b. It is therefore to 43 CFR 3852.1 and not the succeeding section that we must look to establish the meaning of "other legal impediments."

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3/ § 3852.2 Filing of petition for deferment, contests.

"(a) In order to obtain temporary deferment, the claimant must file with the authorized officer of the proper office, a petition in duplicate requesting such deferment. No particular form of petition is required, but the applicant must attach to one copy thereof a copy of the notice to the public required by the act which shows that it has been filed or recorded in the office in which the notices or certificates of location were filed or recorded. The petition and duplicate should be signed by at least one of the owners of each of the locations involved, shall give the names of the claims, dates of location, and the date of the beginning of the one-year period for which deferment is requested. Each petition shall be accompanied by a \$10 nonrefundable service charge.

"(b) If the petition is based upon the denial of a right-of-way, it must state the nature and ownership of the land or claim thereto over which it is necessary to obtain a right-of-way in order to reach the surrounded claims and the land description thereof by legal subdivisions if the land is surveyed, and give full details as to why present use of the right-of-way is denied or prevented and as to the steps which have been taken to acquire the right to use it. The petition should state whether any other right-of-way is available and if so, give reasons why it is not feasible or desirable to use that right-of-way.

"(c) If the petition is based on other legal impediments, they must be set out and their effect described in detail."

The legislative history of 30 U.S.C. § 28b corroborates the narrow construction of "other legal impediments." Senate Report No. 405 (May 19, 1949), repeating in substance House Report No. 489 (April 27, 1949), offers the following explanation for the provision (H.R. 3754):

It frequently happens that the surface of a claim is owned by other than the mineral claimant, or that the claim is surrounded by privately owned lands. Either of these situations may prevent the claimant from performing his assessment work within the specified period if he is unable to make satisfactory arrangements with the surface owners covering possible surface damage, or with the owners of the surrounding lands for a right-of-way. In either of these situations the obstructing party, being on the land without hindrance, will be in a preferred position to "jump" or relocate the claim himself.

U.S. Cong. Ser. 1403, 1404 (1949).

Clearly, both committees had addressed themselves to denial of access and not to other disabilities that might befall a claimant. Examples provided in the same report indicate that Congress contemplated legal impediments within the scope of denial of access.

Some of the obstructions which have arisen are—

1. Delays in making arrangements with surrounding surface owners due to contested titles, family squabbles, changes of ownership during negotiations, etc.
2. Delays in official approval of bonds to protect the owners of the surface of the claims. Such bonds are posted with the Bureau of Land Management, but the claimant may not enter until official approval has been received. The surface owner is entitled to protest the bond in several successive appeal actions, and by delaying tactics he may prevent the claimant from performing assessment or patenting work for many months.
3. Delays in causing legal condemnation of rights-of-way, which can be contested for a long time in the courts.
4. Delays in overcoming by court action the posting of "No trespassing" signs on roads which have been used by the public for many years but have never been declared public roads.

Furthermore, the report quotes the Secretary of the Interior as stating:

I have no objection to the enactment of this bill.

The proposed bill would authorize the Secretary of the Interior, upon the submission of satisfactory evidence, to defer temporarily the annual assessment work requirement in certain contingencies which would make impossible the performance of assessment or mining work and would jeopardize the continued right to hold an unpatented mining claim. Thus, when a mineral claimant could not obtain access to the boundaries of the claim or was hindered from entering upon the surface of the claim by the adjoining landowners or holders of the non-mineral title, under the proposed legislation a deferment for not to exceed 2 years could be granted. The deferred assessment work would constitute an accumulating requirement and no part of it waived. [Emphasis added.]

Id. at 1405.

This Board has consistently applied the same construction of "other legal impediments." Most recently we held: "The major policy goal implicit in the language of this statute is the protection of claimants whose rights of access to their claims have been impeded or denied." Charlestone Stone Products, Co., Inc., 32 IBLA 22, 23 (1977). See also, Portland General Electric Co., 29 IBLA 165 (1977); Richard L. Seltzer, 8 IBLA 105 (1972); James R. Eck, 6 IBLA 263 (1972). 4/

Appellant was correct in his assertion that the pending approval of Trigg's Arrangement under Chapter XI of the Bankruptcy

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4/ Trigg urges that contrary authority appears in Swansea Properties, Inc. v. Hedrick, 416 P.2d 1015, 1017-18 (Ariz. App. 1966), a case in which the defendant failed to perform assessment work while engaged in a suit to quiet title to the mining claims. Trigg asserts that this case suggests the possibility that the mere fact that land is involved in litigation would justify granting a deferment irrespective of questions of access.

Our reading of the case does not support Trigg's position. The defendant in Swansea had not, in fact, petitioned for a deferment; thus the issue of whether the Secretary of the Interior should have granted a deferment was not directly before the court. The court did not consider whether the mining claimant would have been eligible for a deferment, it merely noted that one had not been sought or obtained and that as a result the defendant could not be relieved of the consequences of failing to perform assessment work.

Act did not justify the granting of a deferment of annual assessment work.

Furthermore, it would be anomalous to grant a deferment to one of two co-locators, when it is undisputed that both have equal open access to the claim, but one alleges financial difficulties.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, the protest is allowed and the case remanded for further proceedings consistent herewith. 5/

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Martin Ritvo  
Administrative Judge

We concur.

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Joan B. Thompson  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

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5/ Cf. Pine Grove Nevada Gold Mining Co. v. Freeman, 171 P.2d 366, 375 (Nev. 1946), holding prior to the passage of 30 U.S.C. § 28b that neither illness, financial disaster, nor the action of the elements excused the performance of assessment work though they might impose great hardship rendering it extremely difficult to do the work.

## APPENDIX

<u>Claim Name</u>	<u>Date of Location (or Filing)</u>
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Bronide Mining District, T. 17 S., R. 9 N., Sierra County, New Mexico prime meridian.

BR No. 1 through BR No. 24, inclusive	January 11, 1974
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Carpenter Mining District, T. 16 & 17 S., R. 9 W., Grant County, New Mexico principal meridian.

Grand Central	09-19-25
Grand Central No. 2	11-16-38
Divide	09-19-25
Blue Jay	09-19-25
Blue Bell	09-19-25
Old Mill	09-19-25
Last	07-09-41
Birthday 71	03-31-43
Sunshine No. 1	11-16-38
Sunshine No. 2	11-16-38
Sunshine No. 3	11-16-38
Sunshine No. 4	02-12-47
Sunshine No. 5	02-12-47
Sunshine No. 6	02-12-47
Sunshine No. 7	02-12-47
Sunshine No. 8	02-12-47
Sunshine No. 9	03-19-47
Sunshine No. 10	03-19-47
Colgate	03-19-47
J-1 through J-36, inclusive	11-06-74
J-37 through J-62, inclusive	08-09-74
J-63 through J-188, inclusive	11-06-74
G-1 through G-40, inclusive	06-14-74
Betty	10-22-52
Socks	10-22-52
Boots	10-22-52
Bruce Allan	04-20-74 (approximately)
Mitchell Gray inclusive	04-20-74 (approximately) Ajax No. 1 through Ajax No. 7, 05-02-72
Mineral Mountain No. 1 through Mineral Mountain No. 3, inclusive	05-02-72



<u>Claim Name</u>	<u>Date of Location (or Filing)</u>	
Grand View	12-30-15	
Last Chance		12-30-15
Dwyer	12-30-15	
Log Cabin	12-15-26	
White Pine	02-10-28	
Williams	07-20-27	
Daisy	07-20-27	
Yellow Pine	02-10-28	
Tip Top	03-04-31	
Confidence	01-30-15	
Lindy	07-20-27	
Old John	12-30-15	
Alma	12-30-15	
Grand Central	07-20-27	
Wedge	01-17-47	
Gem	10-22-52	
Iron Lode	10-22-52	
Starlight No. 1 through Starlight No. 3, inclusive	10-22-52	
Hillside No. 1 through Hillside No. 7, inclusive	10-22-52	
Highpoint No. 1 through		

Burro Mountain Mining District, T. 19 & 20 S., R. 15 W., Grant County, New Mexico principal meridian.

RT 137 through 147, inclusive	01-16-73
RT 162	01-16-73
RT 162A	01-16-73
RT 162B	01-16-73
RT 163 through 167, inclusive	01-16-73
RT 179, RT 180	01-16-73
RT 182 through RT 190, inclusive	01-16-73
RT 190A	01-16-73
RT 190B	01-16-73
RT 190C	01-16-73
RT 190D	01-16-73
RT 191 through 212, inclusive	01-16-73
RT 213A	01-16-73
RT 213B	01-16-73
RT 214 through 221, inclusive	01-16-73
RT 224 through 226, inclusive	01-16-73
RT 227A	01-16-73
RT 227B	01-16-73

<u>Claim Name</u>	<u>Date of Location (or Filing)</u>
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RT 228 through 230, inclusive	01-16-73
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RT 1 through 13, inclusive	04-20-74 (approximately)
RT 19 through 37, inclusive	04-20-74 (approximately)
RT 44 through 120, inclusive	04-20-74 (approximately)
RT 213	04-20-74 (approximately)
RT 234	04-20-74 (approximately)
RT 84A	04-20-74 (approximately)
RT 85A	04-20-74 (approximately)
RT 239 through 242, inclusive	04-20-74 (approximately)
Pie 1	04-20-74 (approximately)

Mangus Mining District, T. 17 S., R. 15 W., Grant County, New Mexico principal meridian

T.R. 17 through T.R. 25, inclusive	12-12-74
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Georgetown Mining District, T. 17 S., R 11 & 12 W., and T. 16 S., 12 W., Grant County, New Mexico principal meridian

GTO 1 through 212, inclusive	08-31-72
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